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REFERENDUM

Background information for the guidance of members on:

- *Proposed amendment of the Code of Professional Ethics to repeal Rule 3.03 on competitive bidding*
- *Proposed amendments to the disciplinary clauses of the By-Laws*
- *Proposed amendment of the By-Laws to increase the size of the executive committee*

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

666 FIFTH AVENUE, NEW YORK, N. Y. 10019

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CONTENTS

INTRODUCTION

This booklet provides background on three proposed changes in the Code of Professional Ethics and the By-Laws of the Institute.

All of the proposals have been approved by the Council of the Institute, on the recommendation of the executive committee. The proposal to amend the By-Laws to increase the size of the executive committee originated with the committee on structure. The proposal to repeal Rule 3.03 of the Code on competitive bidding has the unanimous approval of the committee on professional ethics as well as the executive committee. The proposal in regard to the disciplinary provisions of the By-Laws is jointly sponsored by the Trial Board and the ethics committee.

In accordance with the By-Laws, the proposals were included in the call to the annual meeting held in Boston, Mass., on October 3, 1966, for discussion without action.

The By-Laws also provide that, following the annual meeting, the proposed amendments shall be submitted to all members for a vote by mail ballot, accompanied by a statement prepared by the secretary summarizing the arguments presented for and against them.

This booklet is issued in conformity with these requirements. The presentation of each proposal is in two parts: an historical summary of the considerations which led to the recommendation, and a resume of the discussion, if any, which occurred on the proposal at the annual meeting.

In order to become effective, the proposed amendments must be voted upon by at least one-third of the members and must be approved by at least two-thirds of those voting.

The ballots will be valid and counted *only if received by March 20, 1967,* as provided in the By-Laws. Ballots should also be *signed;* unsigned ballots will not be counted.

JOHN L. CAREY
SECRETARY

January 20,1967

PROPOSAL NO. 1
Repeal of Rule 3.03 on Competitive Bidding

I. Background

The Institute has had a prohibition against competitive bidding in its ethical code for a quarter of a century. The original rule, adopted in 1941, precluded a member from making a competitive bid for professional engagements in any state whose CPA society or accountancy board prohibited such bids.

The present Rule, adopted in 1962, constitutes an outright prohibition of competitive bidding. It reads as follows (Article 3, Rule 3.03, of the Code of Professional Ethics):

> *A member or associate shall not make a competitive bid for a professional engagement. Competitive bidding for public accounting services is not in the public interest, is a form of solicitation, and is unprofessional.*

All of the discussion which led to the adoption of the revised Rule clearly indicates that it was not intended to deprive the public of the right to obtain estimates of the cost of professional services. On the contrary, the Rule was designed to protect the public against any unscrupulous practitioner who might seek to acquire clients by offering to perform services at a fee so low as to make it impossible for him—without a financial sacrifice—to comply with professional standards in the conduct of his work. Such a price-cutting approach to a professional practice, if widely adopted, could depress the quality of accounting services, and this in turn would adversely affect the public welfare.

When the proposed revision of the Rule was discussed at the annual meeting in 1961, the committee on professional ethics promised to develop an official interpretation of it which would seek to clarify the distinction between a competitive bid and a legitimate response to a prospective client's request for an estimate of the cost of an engagement.

In the process of working with the committee in the formulation of this interpretive opinion, the Institute's legal counsel, Covington & Burling, became increasingly convinced that it was "highly probable" that any challenge to the legality of Rule 3.03 in a proceeding brought under the Federal anti-trust law would be sustained in the courts.

The executive committee then engaged the law firm of Cahill, Gordon, Reindel & Ohl of New York to undertake an independent appraisal of the question. The second firm strongly supported the opinion of Covington & Burling that, under developing legal concepts, it would be wise to repeal the competitive bidding rule because of the grave risk of being found in violation of the anti-trust laws.

The views of counsel were reported to the executive committee early in the fall of 1965. It was extremely difficult for the committee to accept the possibility that a professional society could be placed in legal jeopardy by its efforts to maintain a high quality of service to the public. However, the committee reluctantly felt that it could not afford to disregard the advice of law firms with extensive experience in anti-trust litigation.

The committee, therefore, alerted the Council to the problem at the fall meeting of the Institute's governing body in Dallas, Texas, on September 18, 1965, and indicated that it planned to conduct a comprehensive review of the situation during the six months prior to the spring meeting of Council.

Representatives of counsel were invited to appear before separate meetings of the executive committee and the committee on professional ethics to respond to inquiries designed to explore all aspects of the situation.

After these appearances, both committees voted unanimously to recommend to Council that an amendment repealing Rule 3.03 should be submitted to the members for a mail ballot.

At its meeting last May, the Institute's governing body approved the recommendation by a vote of 135 to 53.

Following this action by Council, it became apparent from members' inquiries that some apprehension existed about the effects of a repeal of the competitive bidding rule. It was suggested, for example, that if the Rule were deleted from the Code, other provisions would have no bearing on the adequacy of quoted fees. In view of these concerns, the committee on professional ethics met on August 16 and unanimously agreed to issue an opinion which states in effect that the quoting of a clearly inadequate fee may in some circumstances be regarded as evidence of a violation of the solicitation rule (3.02) or of the rule on reporting standards (2.02). The opinion, which will be effective whether or not the rule against competitive bidding is repealed, reads as follows:

Opinion No. 18: Fees and Professional Standards

In determining the amount of his fee, a CPA may assess the degree of responsibility being assumed in the engagement, the time and manpower required to perform the service in conformity with the standards of the profession, the skills needed to discharge his professional obligation to the client and the public, the value to the client of the services rendered, and the customary charges of professional colleagues. Other considerations may also be involved. No single factor can be controlling.

It is characteristic of all professional persons to be more concerned with fulfilling their responsibilities to the public than with immediate financial reward. On occasions they may appropriately choose to serve a client for a fee less than cost, or indeed without any compensation whatever.

However, to quote a fee in advance of an engagement in an amount clearly inadequate to provide fair compensation for performing service in accordance with accepted professional standards may be regarded, in some circumstances, as evidence of solicitation in violation of Rule 3.02 of the Code of Professional Ethics. Without attempting to specify all circumstances that might be relevant in determining the propriety of a particular quotation, it would be appropriate to consider whether there were any facts suggesting that such inadequate fee had been fixed as a part of a plan or design to solicit business.

In such cases of inadequate fees there may be a temptation to minimize losses by reducing the amount of work below that required by Rule 2.02 of the Code, with serious consequences for third parties who rely upon opinions on financial statements.

II. Discussion at Annual Meeting

1. Arguments for Repeal

The basic question involved in this issue can be simply stated: is Rule 3.03 on competitive bidding likely to be considered by the courts to be in violation of the anti-trust laws of the United States?

Two eminent law firms, after exhaustive research, have advised the Institute that in their considered judgment a substantial anti-trust hazard does exist. (The opinions of both firms appear in a separate booklet which accompanies the membership ballot.)

The main points in their opinions can be summarized in these words:

1. The Sherman Act declares that "every contract, combination . . .

or conspiracy in restraint of trade or commerce among the several States" is illegal. Among the restraints covered by the statutes are all agreements among competitors relating to prices. Regardless of the difficulties in applying Rule 3.03 in a particular situation, it obviously enjoins members from attempting to obtain clients by engaging in price competition. It is, in effect, an agreement among the members that they will not engage in price competition.

2. Among the restraints of trade covered by the Sherman Act are all agreements among competitors relating to prices. Although this is often described as directed against "price fixing," it is not confined to agreements to fix particular prices. It applies broadly to all agreements among competitors that suppress or restrain price competition in any way. Such agreements are illegal *per se*—that is, they cannot be justified on any grounds including the contention that (as in the case of Rule 3.03) the objective was protection of the public welfare. As the United States Supreme Court has stated in one case: "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination."

3. The prohibitions in the Sherman Act are limited to activities in restraint of interstate trade or commerce. The courts in recent years, however, have increasingly broadened the concept of interstate commerce. There seems little reason to assume, in view of the scope and nature of the practices of many members, that the courts would hold that the accounting profession was essentially local in character. Moreover, while a substantial number of members may largely operate within the boundaries of a single state, Rule 3.03 does not apply to them alone; it applies to all members.

4. The anti-trust statutes refer to "trade or commerce," and it may be argued that this term does not embrace a professional service. It is true that the U. S. Supreme Court has never ruled directly on the question of whether the practice of law, medicine or accounting is "trade or commerce" within the meaning of the Sherman Act. But after a review of the cases cited in their opinion, the Institute's counsel concludes that "it is likely that the Supreme Court would hold that the professions do not enjoy any general immunity from the application of the Sherman Act." Even if it be assumed, however, that the Supreme Court might apply more lenient standards to the rules and regulations of professional societies than it applies to ordinary commercial activities, the Institute's counsel

Arguments for Repeal (continued)

concludes that the Court is not likely to relax anti-trust standards to the point of permitting the members of professional societies to engage in arrangements that restrict price competition.

None of the official agencies of the Institute which approved the submission of this amendment to repeal Rule 3.03—the executive committee, the committee on professional ethics, and the Council—is in favor of competitive bidding. The Rule was adopted, in all good faith, as a measure of protection for the public. A professional accounting service is not a commodity which can be delivered at a predetermined price based on a set of precise specifications. Only the CPA himself is really qualified to evaluate the amount of work which is required in a particular engagement to enable him to comply with the profession's standards and thus discharge his obligation to all those who may rely upon him. Any approach which appears to place a premium on price is certain to generate destructive tensions within the profession; but, even more importantly, it may have the effect in some instances of depressing the quality of the CPA's services—and this could result in grave injury to the public.

However, all the members of the executive committee and the ethics committee, and the large majority of Council who voted in favor of repeal became convinced that the social desirability of the Rule was unlikely to sustain it in an anti-trust proceeding, that the adverse consequences flowing from such a proceeding would be substantial, and that the objective of the Rule could be achieved by legal means without running the risks inherent in retention of the Rule.

Even with the deletion of the Rule from the Institute's Code, Opinion No. 18 of the ethics committee suggests that members should set their fees in the light of the responsibilities imposed upon them by Rule 3.02 on solicitation and Rule 2.02 on reporting standards.

Moreover, in some 37 states, the state boards of accountancy have issued regulations against competitive bidding comparable to the Institute's Rule. Similar action could be taken in the other states—except possibly in the few states with anti-trust statutes of their own. If certain conditions are or have been met in the issuance of these regulations, it seems clear that they are immune to any challenge under the Federal anti-trust laws. In addition, of course, the board rules apply to all CPAs —not merely to members of the Institute.

It is argued that the Institute's repeal of Rule 3.03 would lead state boards to consider repeal of their own rules on competitive bidding. The basis for this argument has never been explained, and there appears to be no justification for it in the light of counsel's opinion that state board rules have an entirely different legal status.

Several other aspects of this question deserve consideration.

Arguments for Repeal (continued)

It may be contended that the absence of any legal assault on the Rule over an extended period justifies the assumption that no attack is likely to be directed against it in the future.

This contention, in the words of one of the legal opinions filed with the Institute, suggests "the triumph of hope over experience." Nor should any comfort be derived from the fact that other professional organizations may have prohibitions on competitive bidding which have not as yet been challenged. In the view of the attorneys consulted by the Institute, these organizations are equally vulnerable to attack under the anti-trust laws.

In evaluating the prospects of a challenge to the legality of the Rule, it is essential for everyone concerned about the welfare of the Institute to consider the penalties which might be inflicted upon it if the challenge proved successful.

They could be severe.

The Federal government could bring criminal proceedings in which the penalties against each defendant could be a fine of up to $50,000, or imprisonment up to one year, or both, for each offense under each section of the Act. The Institute could be a defendant in such a proceeding. Also, any Council member, officer, staff executive, or committee member, who had authorized, ordered or done anything to enforce, to apply or to interpret the Rule might be a defendant.

The Federal government could also bring a civil suit to enjoin the enforcement of the Rule or to order its deletion from the Code.

In addition, it could bring a civil suit to recover simple damages for any money damages suffered by it or any of its agencies that were caused by the Rule.

Private persons, and states, municipalities and agencies thereof could also recover treble damages suffered by them that were caused by the Rule plus a reasonable fee for their attorney. They might also obtain injunctive relief against the enforcement of the Rule.

Among the situations which might cause the legality of the Rule to be raised in one or more of the above described proceedings are:

(a) Attempted enforcement of the Rule against a member of the Institute. This might result in a treble damage and injunction suit by the member or a complaint by the member to the Department of Justice resulting in its instituting a criminal or civil proceeding;

(b) A municipal agency or corporation, which is aggrieved because it could not obtain competitive bids for accounting services, might institute legal proceedings on its own behalf as indicated above as a private person or it might complain to the Department of Justice and thus instigate a civil or criminal proceeding by it. The same thing could happen in the case of

a Federal agency which had been thwarted in an attempt to get competitive bids. Although it could not sue independently, it could certainly complain to the Department of Justice and it must be assumed that its complaint would receive serious attention.

In view of the possible drastic penalties, those involved in the disciplinary machinery of the Institute are naturally reluctant to summon any member to trial for engaging in competitive bidding. No action, in fact, has yet been taken under the Rule. None is likely to occur in the future. The Rule, therefore, is already inoperative.

It may be suggested that the mere existence of the Rule—even though it may not have been enforced—has had a salutary effect in discouraging a price-cutting approach to the professional practice of accounting, and that this result has been beneficial in protecting the public. But the failure to enforce a rule can also encourage a cynical attitude toward the entire Code of Professional Ethics.

The decision to seek repeal of Rule 3.03 is based on the considered view of the Institute's counsel—a view strongly endorsed by another firm—that it is "highly probable" that the Rule would be declared illegal in any proceeding brought under the anti-trust laws.

That view is both supported and challenged by other attorneys consulted by a few state societies and members.

The opposing opinions which have been made available to the Institute have been carefully reviewed by Covington & Burling—and nothing in them has led the firm to alter its own judgment that the courts would hold that the Rule constitutes a violation of the anti-trust laws.

The opposing opinions, indeed, provide no adequate assurance to the contrary. One of the opinions cited on the floor of the annual business session at Boston, while deprecating the likelihood of an attack on the Rule, conceded that, ". . . any judgment (on this point) must be far from firm."

But since the resources of the Institute—not to mention the safety of those involved in its disciplinary procedures—may be at stake, the lack of any certainty on the legality of the Rule is in itself sufficient cause to recommend its deletion.

This argument, of course, can be turned around. It can be claimed that since the Institute's own counsel suggests that an adverse verdict is only "highly probable," any challenge to the legality of the Rule should be contested through the highest tribunal in the land. Any such effort, however, is certain to be costly—not merely in terms of legal expense, but in terms of the damage which might be inflicted upon the Institute's reputation as a result of the attendant publicity. For any complaint or indictment brought against the Institute is certain to include charges of

Arguments for Repeal (continued)

improper and self-seeking practices—and it is a fact of life that the charges are likely to gain greater press attention and linger longer in the public mind than a later vindication. It is conceivable that the Institute might win in the courts—only to lose far more in the forums of public opinion.

As one member in industry observed in the discussion at the annual meeting, most responsible men in industry and elsewhere who have occasion to seek the services of CPAs understand the undesirability of competitive bidding. This public support, he added, would be destroyed if the Institute persisted in a course which would be regarded as willful disobedience of the law.

It is argued that more time should have been devoted to the question before the membership was asked to eliminate a significant provision of the Code. But those who felt obliged to recommend repeal of the Rule —the executive committee, the ethics committee and the law firms which advised them—have already invested a substantial amount of time in studying the problem for more than a year.

It is also argued that the repeal amendment should be rejected to permit an exploration of alternative actions which might minimize any adverse effect of the repeal. But this exploration would not be precluded by repeal of the Rule. Indeed, such an effort has already been undertaken by the ethics committee in its Opinion No. 18 on Fees and Professional Standards.

Any delay in repealing the Rule, moreover, would be an act of imprudence. The danger inherent in continuance of the Rule, in the judgment of competent legal counsel, is "clear and present." Those who bear the burden of protecting the funds and the reputation of the Institute cannot, in good conscience, ignore their advice.

The time to repeal Rule 3.03, therefore, is now.

2. Arguments Against Repeal

The proposal to repeal Rule 3.03 involves two vital issues—not just one.

The first of these, obviously, is the question of the legality of the Rule under the anti-trust laws. But the second issue is of equal or perhaps even greater significance. That issue is the responsibility of the Institute in maintaining high standards of professional conduct for the protection of the public.

Both of these issues deserve the thoughtful consideration of every member.

The Institute's legal counsel has announced that it is "highly probable" that the Rule would be declared illegal if challenged in the courts

under the Sherman Act. It is no reflection upon the firm to observe that this is merely an opinion—and a somewhat provisional one at that. Other lawyers could come to a different conclusion—and, indeed, they have.

The views of two other lawyers, one of whom was retained by a special committee of a state society and the other retained by an accounting firm, were cited during the discussion of the proposed repeal at the annual meeting in Boston.

The opinion of one of them made these points:

1. The U. S. Supreme Court has not passed on the question of whether or not the practice of medicine, law or accounting is in "trade or commerce;" but even if it should so determine, there must additionally be an act in restraint of trade.

2. Rule 3.03 is not (as suggested by the Institute's counsel) "an agreement among the members that they will not engage in price competition" because an audit report involves the reputation of a CPA, and a third party who relies upon it has a cause of action against the accountant who is guilty of issuing a false or misleading report.

3. The effect of Rule 3.03 is not price fixing because competitive bidding implies that the client would determine the scope of the audit, including the extent of the tests to be made by the auditor.

4. It is inconceivable that the Justice Department would take an interest in the question of competitive bidding as applied to accountants and the other professions where the overall public policy existing in the various states is opposed to the awarding of contracts for professional services on a competitive basis—particularly because the independence of the professions has been a long cherished tradition.

5. It is equally inconceivable that a private person or third party could establish a case based on the failure to receive competitive bids for an audit unless it be a suit by a disgruntled stockholder against a corporation's directors for not securing bids on the theory that the company might have saved some money. This seems quite remote because a matter of business judgment on the part of corporate directors, in the absence of fraud or gross negligence, is not ordinarily actionable.

The following two sentences were quoted at the annual meeting from another opinion: "Though any judgment must be far from firm, my conclusion is that Rule 3.03 of the Code of Professional Ethics would not likely provoke an anti-trust attack by the Justice Department. Equally important, should the provision be attacked in a private treble-damage suit by a disgruntled accounting firm or by a client, chances would be good for a successful defense in the court." It is important to note that the lawyer who rendered that opinion headed the Anti-Trust Division of the Justice Department some years ago.

Arguments Against Repeal (continued)

Neither of these opinions preclude the possibility of an attack upon the Rule on anti-trust grounds; but they do raise a reasonable doubt about the likelihood of such a challenge—or its success if it should ever materialize.

This doubt is further strengthened by the fact that other professional organizations—the American Institute of Architects, the American Society of Civil Engineers, the American Bar Association, to name only a few—have adopted injunctions against competitive bidding for professional engagements. Like the Institute's Rule, these proscriptions of bidding have existed for a number of years. Yet none of them—nor the Institute's own Rule—has so far been subjected to legal challenge. It seems particularly absurd for CPAs to be concerned about a legal problem which apparently does not trouble the legal profession.

Why, after such an extended period of immunity, should such an attack be mounted now?

It is not enough, in response to this inquiry, to refer vaguely to "developing legal concepts" or to speculate about what might happen on the basis of what has already occurred when the legal lessons of the past are not clear. This kind of reply is simply not good enough to justify taking an action of grave import to the profession and to the public which it seeks to serve with distinction.

Even if the apprehensions of the Institute's counsel are reasonable, however, the Institute ought not to be a victim of panic and take a hasty action which it may later regret.

The present rule on competitive bidding was adopted only five years ago. It concludes with the observation that competitive bidding "is not in the public interest, is a form of solicitation, and is unprofessional."

What has happened in this short interval to suggest that these reasons in support of a prohibition against competitive bidding are no longer valid?

If nothing has happened to invalidate them, then the Institute should not be prepared to sacrifice a rule designed for the protection of the public because two law firms have expressed the belief that a legal cloud now hangs over it.

As a responsible organization representing a profession dedicated to public service, the Institute has an obligation to defend the Rule against any and all attacks—all the way to the United States Supreme Court if necessary.

The commitment to retain the Rule might obviously require a heavy expenditure of funds; but if the profession remains convinced that competitive bidding injures the public, then the funds of the Institute could not be utilized in a better cause.

Arguments Against Repeal (continued)

Nor should the specter—real or imagined—of public criticism deter the Institute from pursuing this course if conscience dictates it. No doubt some ill-informed observers might leap to the conclusion that the profession was solely concerned about advancing its own self-interest if it resisted any effort to nullify the competitive bidding rule. But an equal number—perhaps a greater number—would be impressed by an organization which was prepared to run serious risks in defense of a professional standard which protects the public welfare.

But even if the consequences of resistance prove to be as dire as predicted, this would still not justify a retreat from principle.

It is suggested that the Rule is already a "dead letter" because the threat of legal action inhibits its enforcement. The failure to apply it is regrettable; but even if it is not enforced, its presence in the Code at least proclaims the profession's distaste for an unseemly practice which encourages substandard performance—and this alone may have a beneficial influence.

It is suggested, too, that the Institute's Rule is hardly necessary because the state boards of accountancy, with legal impunity, can proscribe competitive bidding by a properly devised regulation—and that many of them have already done so. However, any reliance placed by the profession on state board rules may prove to be illusory, because repeal of the Institute's Rule would cause the rules of the state boards to erode. They would become difficult to enforce and eventually would be eliminated. In any case, it will require a substantial effort to obtain enabling legislation to permit the other boards to adopt such regulations—and some will never be allowed to do so because of the existence of a state anti-trust statute.

It is argued, further, that Opinion No. 18 of the committee on professional ethics provides ample protection against any of the hazards envisioned by opponents of repeal. The latter, however, consider Opinion No. 18 to be neither strong nor direct and an inadequate substitute for the Rule itself. The Opinion is merely the statement of a committee and thus lacks the force of a rule approved by the full membership.

Much has been made of the fact—and it is a fact—that the Council approved the amendment for repeal for submission to the membership by a vote of 135 to 53. But it is also a fact that at that time members of Council were provided only with oral advice by the Institute's counsel; they did not have the benefit of a written statement from the Institute's counsel, nor were they aware of other opinions which, at least, suggest that the legal question does not have only one answer. And it is also a fact worthy of note that a switch in only 42 votes would have led to the defeat of the proposal.

Arguments Against Repeal (continued)

There has not been sufficient time since this subject was first exposed to the membership to consider various alternatives to the present Rule, if indeed an equally effective alternative can be found. The opponents of repeal of Rule 3.03, although open-minded on the subject of such an alternative, do not at this time concede that it can be found.

The proposal to repeal Rule 3.03 is so vital to the public interest and to the standards of our profession that more time, thought and appraisal should be devoted to it. The Rule, therefore, should be retained, and this conclusion expressed by a negative vote on the proposal to repeal it.

PROPOSAL NO. 2
Amendments to Disciplinary Clauses of By-Laws

I. Background

The proposed changes in the By-Laws originated with the Trial Board and the committee on professional ethics. They have been approved by the executive committee and the Council for submission to the membership in a mail ballot.

The purpose of these proposed changes is to facilitate the functioning of the Institute's disciplinary machinery. Under the present By-Laws, a member convicted of a crime involving moral turpitude may be expelled only after a hearing by the Trial Board (or a sub-board). If it is found that he has been convicted, expulsion is mandatory; yet the process may consume many months. In addition, when a member's CPA certificate has been revoked for disciplinary reasons, he must still be brought to trial; and although expulsion under these circumstances is virtually certain (although not mandatory), the elaborate process of trial is required. The proposed amendment would enable the Institute to terminate promptly and automatically the membership of a member who has clearly lost his claim to professional status—without an elaborate and costly trial having a predictable result.

Moreover, in these cases, the Institute would not be obliged to say, as it now must say on occasion, that a member has not yet been disciplined by his professional society even though he has been convicted of a serious crime or has been deprived of his CPA certificate.

It is also proposed that a new section be added to the By-Laws to permit the reinstatement by the Trial Board after a three-year lapse of a member who has been expelled or whose membership has been terminated for disciplinary reasons. Under the present By-Laws, there is no such provision for reinstatement, except when a member's criminal conviction has been reversed or when the Trial Board has rescinded a prior decision.

Since an expelled member is now permanently barred from membership, the Trial Board has occasionally tended to avoid expulsion in borderline cases simply because of the permanent nature of the expulsion. The proposed amendment takes into account the possibility that an expelled member might pay his debt to society, rehabilitate himself, and regain his professional status.

In addition, a member deprived of membership under the automatic provisions would be automatically reinstated if his conviction for a serious crime or his loss of the CPA certificate upon which the disciplinary action was based is later set aside.

Finally, the proposed amendments include a new provision which states, in effect, that a member renders himself liable to explusion or suspension if he fails to cooperate with the committee on professional ethics in its investigation of any complaint against him. This is intended to apply to members who simply refuse to respond to inquiries from the ethics committee; it is not directed against a member who, on the advice of legal counsel, declines to provide information for the time being on the grounds that his rights in a pending legal action might be prejudiced.

One further comment is in order. Three years ago, the membership was asked to vote on a proposed change in the By-Laws which would have called for the suspension without prejudice of a member who had been *indicted* for a serious crime. This 1963 proposal, which failed to obtain the required two-thirds favorable vote of the membership, differs materially from the current proposal. The current amendment would require action only after *conviction* of a criminal offense.

The text of the proposed changes in the By-Laws, showing all deletions, additions and other language changes necessitated by the amendments, appears in the appendix of this booklet.

II. Discussion at Annual Meeting

Although an expression of any opposing viewpoints in regard to these amendments was invited, none occurred at the annual meeting.

PROPOSAL NO. 3
By-Law Amendment to Increase Size of Executive Committee

I. Background

This proposal originated with the committee on structure. In a report distributed to all members of the Institute last summer, the committee suggested that the executive committee should be strengthened to enable it to provide over-all direction to the broadening programs of the Institute.

The proposal, approved for submission to the membership by the executive committee and the Council, would expand the size of the executive committee from 13 to 16 members by adding the immediate past president of the Institute and by increasing the number of elected members from seven to nine. In order to gain additional continuity in service on the committee, the proposal also would establish three-year terms for the elected members.

To give effect to this recommended change it is proposed that Article IX, Section 2, paragraph (b), of the By-Laws be amended to read in its entirety as follows:

The executive committee shall consist of the president, the four vice presidents, the treasurer, the immediate past president, and nine other members or former members of the Council who shall be elected by the Council. Of the nine members to be so elected in 1967, three shall serve for one year, three for two years, and three for three years, or until their successors have been elected. Thereafter, beginning in 1968, the Council shall annually elect three members to serve for three years, or until their successors have been elected. Vacancies occurring among the elected members shall be filled by the Council for the unexpired terms. No elected member who has served for a full three-year term shall be eligible

for reelection until the annual meeting of the Institute next following completion of his term of service. Seven members shall constitute a quorum of the committee.

II. Discussion at Annual Meeting

Although discussion of this proposal was invited, none occurred at the annual meeting.

APPENDIX

Text of Proposed Amendments to the Disciplinary Clauses of the By-Law

It is proposed that Article V and Article VI of the By-Laws be amended, as follows:

Change Article V (proposed additions are in italics) to read in its entirety as follows:

Section 1. Resignations of members or associates may be offered in writing at any time and shall be effective on the date of acceptance. Action upon the resignation of a member or associate in good standing shall be taken by the executive committee, and, in the case of a member or associate under charges by the Trial Board or a sub-board appointed to hear the case. *No action shall be taken on the resignation of a member or associate with respect to whom possible charges are under investigation by the committee on professional ethics. Action upon the resignation of a member or associate against whom charges are pending to be heard by the Trial Board or a sub-board shall be taken by the Trial Board or the sub-board appointed to hear the case. Action upon the resignation of a member or associate who is suspended under Article V, Section 6(a) or (c) shall be taken by the Trial Board or by an ad hoc committee thereof consisting of at least five members appointed by the chairman of the Trial Board or vice chairman, when acting as chairman.*

Section 2. A member or associate who fails to pay his annual dues or any subscription, assessment, or other obligation to the Institute within five months after such debt has become due shall automatically cease to be a member or associate of the Institute, unless in the opinion of the executive committee it is not in the best interests of the profession that his membership or affiliation be terminated in this way.

Section 3. (a) A member or associate who shall resign while in good standing may, upon request made in writing to the Institute, be reinstated by the executive committee without a reinstatement fee.

(b) The executive committee, in its discretion, may reinstate a member or an associate whose membership or affiliation has been terminated for non-payment of dues or any other obligation owing by him to the Institute, pro-

vided that his reinstatement shall not become effective until he shall have paid to the Institute all dues and other obligations owing by him to it at the time of such termination, and shall also have paid to it a reinstatement fee in such amount, if any, as shall have been determined by a general resolution of the Council.

(c) No person shall be considered to have resigned while in good standing if at the time of his resignation he was in debt to the Institute for dues or other obligations. A member or associate submitting his resignation after the beginning of the fiscal year, but before expiration of the time limit for payment of dues or other obligations, may attain good standing by paying dues prorated according to the portion of the fiscal year which has elapsed, provided obligations other than dues shall have been paid in full.

(d) A member or associate who has resigned or whose membership or affiliation has been terminated *in any manner* may not file a new application for admission but may apply for reinstatement under *the applicable provision of paragraph* (a) or (b) of this section, *or Article VI, Section 5(b) or (c).*

Section 4. A member or associate renders himself liable to expulsion or suspension by the Trial Board or a sub-board thereof if

(a) he refuses or neglects to give effect to any decision of the Institute or of the Council, or

(b) he infringes any of these By-Laws or any provision of the Code of Professional Ethics, or

(c) he is declared by a court of competent jurisdiction to have committed any fraud, or

(d) he is held by the Trial Board or a sub-board thereof to have been guilty of an act discreditable to the profession, or to *have been convicted of a criminal offense which tends to discredit the profession, or*

(e) he is declared by any competent court to be insane or otherwise incompetent, or

(f) his certificate as a certified public accountant is suspended, revoked or withdrawn by the authority of any state, territory, or territorial possession of the United States or the District of Columbia. However, should the secretary of the Institute be of the opinion that it may be in the best interest of the Institute to terminate, without trial, the membership of a member or the affiliation of an associate whose certificate has been so suspended, revoked or withdrawn, the secretary shall refer the matter to the executive committee. In such event, the executive committee may terminate, without trial, such membership or affiliation, if it determines that it is in the best interest of the Institute to do so *or license or permit to practice as such or to practice public accounting is suspended, revoked, withdrawn or cancelled as a disciplinary measure by any governmental authority, or*

(g) he fails to co-operate with the committee on professional ethics in its efforts to ascertain the facts pertaining to whether such member or associate is subject to disciplinary action pursuant to the By-Laws of the Institute. Accordingly, a member or associate shall respond to communications from the committee requesting information as to such facts within thirty days of the mailing of such communications by registered mail, postage prepaid, addressed to the member or associate concerned at his last known address, according to the records of the Institute.

Section 5. A member or associate shall be expelled if the Trial Board or a sub-board thereof finds, by a majority vote of the members present and en-

titled to vote, that he has been convicted by a court of a felony or other crime or misdemeanor involving moral turpitude *any of the criminal offenses set forth in Article V, Section 6(a), or any crime involving moral turpitude;* provided, in the case of such a finding by a sub-board, its finding in this respect is not reversed by the Trial Board. If the court conviction shall be reversed by a higher court, such member or associate may request reinstatement, and such request shall be referred to the committee on professional ethics which, after investigating all related circumstances, shall report the matter, with the committee's recommendation, to the Trial Board, with respect to cases heard initially by it and cases heard by it on review of a decision of a sub-board and to the sub-board which heard the case, with respect to cases heard by such sub-board in which no request for review has been granted. Whereupon the Trial Board or sub-board, as applicable, may by a majority vote of the members present and entitled to vote, reinstate such member or associate.

Section 6. (a) The membership or affiliation of a member or associate who is convicted by a court of any of the following criminal offenses: a crime which is defined as a felony under the laws of the convicting jurisdiction; willfully failing to file any income tax return which he, as an individual taxpayer, is required to file under the law; willfully attempting to evade or defeat any income tax, or the payment thereof, by filing a false and fraudulent income tax return on behalf of himself or a client; or willfully aiding in the preparation or presentation of a false and fraudulent income tax return of a client; shall become automatically suspended upon mailing a notice of such suspension, as provided in paragraph (e) of this section. Such notice shall be mailed within a reasonable time after a certified copy of a judgment of conviction of such criminal offense has been filed with the secretary of the Institute.

(b) The membership or affiliation of a member or associate who has been convicted by a court of any of the offenses set forth in paragraph (a) of this section, and which conviction has become final, shall become automatically terminated upon mailing a notice of such termination, as provided in paragraph (e) of this section. Such notice shall be mailed within a reasonable time after a certified copy of such conviction and evidence that it has become final has been filed with the secretary of the Institute.

(c) The membership or affiliation of a member or associate whose certificate as a certified public accountant or license or permit to practice as such or to practice public accounting has been suspended as a disciplinary measure by any governmental authority shall, except as provided in paragraph (f) of this section, become automatically suspended upon the expiration of thirty days after mailing a notice of such suspension, as provided in paragraph (e) of this section. Such notice shall be mailed within a reasonable time after a statement of such governmental authority, showing that such certificate, license or permit has been suspended and specifying the cause and duration of such suspension has been filed with the secretary of the Institute. Such automatic suspension shall cease upon the expiration of the period of suspension so specified.

(d) The membership or affiliation of a member or associate whose certificate as a certified public accountant or license or permit to practice as such or to practice public accounting has been revoked, withdrawn or cancelled as a disciplinary measure by any governmental authority shall, except as provided in paragraph (f) of this section, become automatically terminated upon the expiration of thirty days after mailing a notice of such termination, as provided in paragraph (e) of this section. Such notice shall be mailed within

a reasonable time after a statement of such governmental authority showing that such certificate, license or permit has been revoked, withdrawn or cancelled and specifying the cause of such revocation, withdrawal or cancellation has been filed with the secretary of the Institute.

(e) Notices of suspension or termination pursuant to paragraph (a), (b), (c) or (d) of this section shall be signed by the secretary of the Institute and mailed by registered mail, postage prepaid, addressed to the member or associate concerned at his last known address according to the records of the Institute.

(f) The operation of paragraph (c) or (d) of this section shall become postponed if, within thirty days after mailing the notice of suspension or termination, the secretary of the Institute receives a request from the member or associate concerned that the pertinent provision shall not become operative. The request shall state briefly the facts and reasons relied upon. All such requests shall be referred to the Trial Board for action thereon by the Trial Board or by an ad hoc committee thereof consisting of at least five members appointed by the chairman of the Trial Board or vice chairman, when acting as chairman.

If the request is denied, the suspension or termination, as the case may be, shall become effective upon such denial, and the member or associate concerned shall be so notified in writing by the secretary. No appeal to the Trial Board shall be allowable with respect to a denial of such a request by the ad hoc committee.

If the request is granted, the suspension or termination, as the case may be, shall not become effective. In such event, the secretary shall transmit the matter to the committee on professional ethics to take whatever action it considers proper in the circumstances.

A determination that paragraph (c) or (d) of this section shall not become operative shall be made only when it clearly appears that, because of exceptional or unusual circumstances, it would be inequitable to permit such automatic suspension or termination.

(g) When a membership or affiliation is suspended or terminated under paragraph (a), (b), (c) or (d) of this section, a statement of such suspension or termination, giving the reasons therefor, shall be published in The CPA. *Such statement shall be in a form approved by the chairman of the Trial Board or the vice chairman when acting as such, and shall disclose the name of the member or associate concerned unless the chairman or vice chairman decides that the name be omitted.*

(h) The provisions of this section shall not preclude the summoning of the member or associate concerned to appear before the Trial Board or a sub-board pursuant to Article VI, nor shall it preclude the imposition of any penalty under Article V, Section 5, or Article VI, Section 3(b), unless his membership or affiliation has been terminated pursuant to paragraph (b) or (d) of this section.

(i) The period of suspension pursuant to paragraph (a) or (c) of this section shall not be counted in computing the period of not more than two years, for which the Trial Board or a sub-board may suspend a member or associate under Article VI, Section 3(b).

Section 6. 7. The Council may, in its discretion, terminate the affiliation of an international associate.

Section 8. (a) The provisions of Article V, Sections 4, 5 and 6 and Article

VI, Section 1, which became effective on [date of adoption by members] shall not be applied retroactively to any offense or wrongful conduct occurring prior to such effective date regardless of the date of judgment of conviction or order of a governmental authority based upon such offense or wrongful conduct. Any such offense or wrongful conduct shall be punishable under the pertinent By-Law provisions which were in effect immediately prior to such effective date. Such By-Law provisions are continued in effect for this purpose.

(b) The provisions of Article V, Section 3(d) and Article VI, Section 5(b) and (c) which became effective on [date of adoption by members] shall apply retroactively as well as prospectively.

(c) The provisions of Article V, Section 1, which became effective [date of adoption by members] shall apply after such effective date to any resignation, regardless of when submitted.

Change Article VI (proposed additions are in italics) to read in its entirety as follows:

Section 1. Any complaint preferred against a member or associate under Section 4 *or* 5 of Article V shall be submitted to the committee on professional ethics. If, upon consideration of a complaint, it appears to the committee that a prima facie case is established showing a violation of any By-Law or any provision of the Code of Professional Ethics or conduct discreditable to a public accountant, the committee on professional ethics shall report the matter to the secretary of the Institute, who shall summon the member or associate involved thereby to appear in answer at the next meeting of the Trial Board or any sub-board appointed to hear the case; except that in any case involving a prima facie showing of violation of Article V, Section 4, paragraph (f), he may, in his discretion, submit the matter to the executive committee. In the event of such submittal, the executive committee shall either terminate the membership or affiliation of such member or associate pursuant to Article V, Section 4, paragraph (f) or summon him to appear in answer at the next meeting of the Trial Board or any sub-board appointed to hear the case, *provided, however, that with respect to a case falling within the scope of Article V, Section 6, such committee shall have discretion as to whether and when to report the matter to the secretary for such summoning.*

Section 2. If the committee on professional ethics shall dismiss any complaint preferred against a member or associate, or shall fail to act thereon within ninety days after such complaint is presented to it in writing, the member or associate preferring the complaint may present the complaint in writing to the Trial Board; *provided, however, that this provision shall not apply to a case falling within the scope of Article V, Section 6.*

The Trial Board shall make such investigation of the matter as it may deem necessary, and shall either dismiss the complaint or refer it to the secretary of the Institute, who shall summon the member or associate involved thereby to appear in answer at the next meeting of the Trial Board or any sub-board appointed to hear the case.

Section 3. For the purpose of adjudicating charges against members or associates of the Institute, as provided in the foregoing sections:

(a) The secretary of the Institute shall mail to the member or associate concerned, at least thirty days prior to the proposed meeting of the Trial Board, or any sub-board appointed to hear the case, written notice of the charges to be adjudicated. Such notice, when mailed by registered mail, postage prepaid, addressed to the member or associate concerned at his last known

address, according to the records of the Institute, shall be deemed properly served.

(b) After hearing the evidence presented by the committee on professional ethics or other complainant, and by the defense, the Trial Board or sub-board hearing the case, by a majority vote of the members present and voting, may admonish or suspend, for a period of not more than two years, the member or associate against whom complaint is made, or by a two-thirds vote of the members present and voting, may expel such member or associate. The Trial Board or sub-board hearing the case shall decide, by a majority vote of the members present and voting, whether the statement of the case and the decision to be published shall disclose the name of the member or associate involved. A statement of the case and the decision of the Trial Board or sub-board hearing the case shall be prepared by a member or members of the Trial Board or the sub-board, as the case may be, under a procedure to be established by such Trial Board or sub-board, and the statement and decision, as released by the Trial Board or sub-board, shall be published in *The CPA*. No such publication shall be made until such decision has become effective, as hereinafter provided.

(c) The member or associate concerned in a case decided by a sub-board may request a review by the Trial Board of the decision of the sub-board, provided such a request for review is filed with the secretary of the Trial Board at the principal office of the Institute within thirty days after the decision of the sub-board, and shall file with such request such information as may be required by the rules of the Trial Board. Such a review shall not be a matter of right. Each such request for a review shall be considered by an ad hoc committee to be appointed by the chairman of the Trial Board, or its vice chairman in the event of his unavailability, and composed of not less than five members of the Trial Board who did not participate in the prior proceedings in the case. The ad hoc committee shall have power to decide whether or not such a request for review by the Trial Board shall be allowed, and such committee's decision that such a request shall not be allowed shall be final and subject to no further review. A quorum of such an ad hoc committee shall consist of a majority of those appointed. If such a request for review is allowed, the Trial Board shall review the decision of the sub-board in accordance with its rules of practice and procedure. On review of such a decision the Trial Board may affirm, modify, or reverse all or any part of such decision or make such other disposition of the case as it deems appropriate. The Trial Board may by general rule indicate the character of reasons which may be considered to be of sufficient importance to warrant an ad hoc committee granting a request for review of a decision of a sub-board.

(d) Any decision of the Trial Board, including any decision reviewing a decision of a sub-board, shall become effective when made, unless the Trial Board's decision indicates otherwise, in which latter event it shall become effective at the time determined by the Trial Board. Any decision of a sub-board shall become effective as follows:

(i) Upon the expiration of thirty days after it is made, if no request for review is properly filed within such thirty-day period;

(ii) Upon the denial of a request for review, if such a request has been properly filed within the thirty-day period and has become denied by the ad hoc committee; and

(iii) Upon the effective date of a decision of the Trial Board affirming

the decision of a sub-board in cases where a review has been granted by the ad hoc committee, and the Trial Board has affirmed the decision of such sub-board.

Section 4. At any time after the publication in *The CPA* of a statement of the case and decision, the Trial Board may, with respect to a case heard by it, initially or on review of a decision of a sub-board, and the sub-board may, with respect to a case heard by it in which its decision has become effective without a review by the Trial Board, by a two-thirds vote of the members present and voting, recall, rescind, or modify such expulsion or suspension, a statement of such action to be published in *The CPA*.

Section 5. (a) Should a judgment of conviction or an order of a governmental authority on which the suspension or termination of membership or affiliation of a member or associate was based under Article V, Section 6(a), (b), (c) or (d) be reversed or otherwise set aside or invalidated, such suspension shall terminate or such member or associate shall become reinstated, when a certified copy of the order reversing or otherwise setting aside or invalidating such conviction or order is filed with the secretary of the Institute.

(b) A member or associate who has been suspended or expelled pursuant to Article V, Section 4(c), (d), (e) or (f), or expelled pursuant to Article V, Section 5, may request that the suspension terminate or request reinstatement if the judgment of conviction, the order in finding of court or the order of the governmental authority, on which the suspension or expulsion was based, has been reversed or otherwise set aside or invalidated. Such request shall be referred to the committee on professional ethics which, after investigating all related circumstances, shall report the matter, with the committee's recommendation, to the Trial Board. Whereupon the Trial Board may, by a majority vote of the members present and entitled to vote, terminate the suspension or reinstate such member or associate, after according him such hearing, if any, as may be appropriate.

(c) Except as provided in paragraphs (a) and (b) of this section, a member or associate whose membership or affiliation has been automatically terminated under Article V, Section 6(b) or (d), or who has been expelled by the Trial Board or a sub-board, or whose resignation has been accepted by the Trial Board, an ad hoc committee thereof or a sub-board, may, at any time after three years from the effective date of such termination, expulsion or acceptance of resignation, request reinstatement of his membership or affiliation. Such request shall be referred to the committee on professional ethics, which, after investigation, shall report the matter, with the committee's recommendation, to the Trial Board. Whereupon the Trial Board may reinstate such member or associate on such terms and conditions as it shall determine to be appropriate. If an application for reinstatement under this paragraph is denied, the member or associate concerned may again apply for reinstatement at any time after two years from the date of such denial.